UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 15 Cr. 643 PKC

GARY HIRST, et al.,

Defendants.

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September 1, 2016
11:11 a.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

PREET BHARARA,
United States Attorney for the
Southern District of New York
BRIAN ROGER BLAIS,
REBECCA GABRIELLE MERMELSTEIN,
AIMEE HECTOR,
Assistant United States Attorneys

SHER TREMONTE, LLP,
Attorneys for defendant Hirst
BY: JUSTINE ALETA HARRIS, Esq.
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NOAM KORATI BIALE, Esq.
Of counsel

(In open court)

(Case called)

THE COURT: Please be seated.

Good to see you all. Good morning.

First of all, I want to thank you for getting me the government's requests to charge and the defendant's response, the proposed examination of jurors. These were all submitted quite some time ago, but they are front and center relevant. What I will endeavor to do is early on in the trial, I will give you a draft of the proposed jury instructions, and you can comment on the draft. My draft will have taken account of the submissions that have previously come to me.

There are a number of in limine issues, and I want to move through them with some dispatch. I don't know, Ms. Harris, whether you will be taking the lead on this?

MS. HARRIS: I will today, your Honor.

Thank you.

THE COURT: The first one is we have an indictment here the grand jury has returned that charges a conspiracy, that from my review, does not indicate that Mr. Hirst joined the conspiracy on day one. At least that's the way it appears, and as is true in most every conspiracy case tried in this courthouse, Mr. Hirst did not participate in all events or meetings of appertaining to the conspiracy.

Under the law of the Circuit and the Supreme Court precedent, it is charged as a single conspiracy. It appears on my review to be a single conspiracy, and the government is entitled to prove the existence of that single conspiracy, including the acts of co-conspirators during and in furtherance of the conspiracy, including acts that Mr. Hirst did not know of or perhaps could not have known of.

That seems to me to be dispositive of some of your arguments. If you'd like case law on this, the Narnajo case out of the Circuit, N A R N A J 0, 14 F.3d 145; Smith v. U.S. out of the Supreme Court from 2013. There are just too many cases in this circuit for me to go on and on and on with screen-shots.

Is there anything you want to add, Ms. Harris, on that one?

MS. HARRIS: Your Honor, just very briefly. We are cognizant certainly of the basic law of conspiracy, although as defense counsel, we somewhat at times are stubbornly resistant of accepting its precepts. I think the concern here is as follows:

This is an unusual case, where we believe that essentially the direct evidence as laid out in the government's opposition to the in limine focuses on an alleged series of omissions, a failure to disclose, deceptive conduct that they allege Mr. Hirst engaged in, and that is going to be the core evidence about Mr. Hirst in particular about whether or not he joined the conspiracy, formed an illegal agreement with the others charged in this case. I think on that issue there is going to be a vigorous and fulsome dispute at trial about whether those allegations can be sustained.

Here what we're concerned about is that the subsequent acts of the co-conspirators which the government alleges were reasonably foreseeable, we'll take issue with that, but that is the allegations they charged in a single conspiracy. Those subsequent acts and the volume of evidence related to those subsequent acts and the nature and quality of those subsequent acts, which is e-mails about bribing or working with corrupt investment advisors, co-conspirator statements about getting someone to lie to someone, matched trading schemes. There will be tons of expert testimony about matched trading engaged in by co-conspirators.

Our concern here, we understand here the basic rubric of conspiracy law, is that we risk the tail wagging the dog, in essence, and I think some of the case law even in the Second Circuit that approve the Pinkerton charges, causes the appropriateness of a Pinkerton charge where the nature of the evidence is subsequent substantive acts of co-conspirators could taint and overwhelm the evidence of the initial, the core of the case which is whether Mr. Hirst engaged in an illegal agreement.

We recognize and begrudgingly accept the nature of the conspiracy law in this case and its implications, but we ask that to the extent that the court limit the extent of the sort of subsequent act evidence because that is frankly evidence we have no ability to dispute because it doesn't involve Mr. Hirst, and because of its volume, we worry it is really going to overshadow and unfairly sort of taint the jury's consideration of the conspiracy evidence.

THE COURT: A fair concern, a fair concern, and it is appropriate for you to raise it. Among the tools at my disposal are Rule 403 and, further, the ability to give you limiting instructions as to what this evidence relates to and what it doesn't relate to.

I think you'll find I'm not shy in utilizing those and other tools as appropriate. The reality is in a case, criminal case, the court and perhaps the defendant does not know the full import of the government's evidence or what that evidence is for that matter until you hear opening statements and the evidence is put on.

So I appreciate the heads-up, if you will, but that's where it stands as of this point.

MS. HARRIS: Understood, Judge.

There are two, on this issue there were just two issues that I thought two aspects of the government's case I thought raised particular concerns along those lines, and we can defer consideration of it until the trial, but I thought I would mention it now.

As the court knows, the government has proposed testimony by two individuals who are relatives, the children really of investors who lost money.

THE COURT: Victims of Tagliaferri?

MS. HARRIS: Correct. We are willing to stipulate that investors suffered losses as a result of the corrupt behavior of Tagliaferri or however the government would like to phrase that kind of stipulation.

That is not an issue that will be in dispute and I think the kind of testimony, given how attenuated the investor losses were from the direct evidence against Mr. Hirst, that would be one piece of evidence that really could unfairly prejudice the case, the jury's consideration of the initial charges related to the conduct Mr. Hirst actually engaged in.

THE COURT: Well, the good news is the photographs of the deceased family members are not coming in, that I can tell you.

MS. HARRIS: We do take comfort from that. We see the government withdrew their request along those lines. We ask for the actual testimony to be substituted by way of stipulation and we can see perhaps when we get closer to that point in time.

THE COURT: I think we have to see when we get close to that point in time because, generally speaking, the government is entitled to show how a conspiracy, particularly a conspiracy to defraud, to defraud affected the victims. That evidence can't overwhelm the trial, and it can be the kind of evidence that can be subject to a cumulativeness objection or a 403 (b) objection, but we're not there yet, and but again thank you for the heads-up.

MS. HARRIS: The other point along those lines the proposed testimony of Professor Laby on the question of question of investor adviser duty.

We are willing to stipulate the investors have duties to clients so they can't prove their advisers engaged in other conduct. Having the expert with the professorial sort of vouching that comes with an expert who is testifying in court, I think the jury can easily be confused those are duties Mr. Hirst owed or somehow there was an additional breach here that is really not fairly put on Mr. Hirst personally.

That is another area where I think it is at the out of reaching of what is necessary for the government's case and, frankly, again given our initial concern about the potential taint on the conspiracy evidence, we also point the court to that particular proposed evidence.

THE COURT: On that one, it is a useful idea to propose a stipulation to the government, number one.

Number two, again this is an area where strong limiting instructions from the court can be of value to make sure that the jury understands the use, the use it may put the evidence to and, more importantly, the uses to which it may not put the evidence to. So again thank you for the heads-up.

Anything else?

MS. HARRIS: I can go through the other issues in our in limine or wait?

THE COURT: No. First of all, let me hear from Mr. Blais or one of his colleagues if there is anything on the issues we have discussed so far that you wanted to comment on, I would be happy to hear you.

MR. BLAIS: Just very briefly, your Honor.

The government is obviously cognizant Mr. Hirst is on trial and not his co-conspirators. We certainly don't intend to let evidence of non-Hirst-related, non-Hirst conduct overwhelm the trial. It would not be to our strategic benefit to allow it to overwhelm.

THE COURT: I am quite sure it would not.

MR. BLAIS: We don't intend to do that.

That being said, we agree with the court and with the case law that says the government can prove the operations of the entire conspiracy including what is referred to as subsequent acts. There is no suggestion Mr. Hirst withdrew from this conspiracy at any point, and so we are entitled under the case law to introduce evidence as to acts that came after a point in time, the last overt act attributed to Mr. Hirst, and we certainly intend to do that.

Just quickly, with respect to the victim testimony, the testimony of Professor Laby, the victim testimony will be short and certainly we don't intend it to be cumulative. I think it is probably going to be 10 to 15 minutes per witness. Again we are not intending to let that overwhelm the trial, but we certainly do believe we are entitled to show that real people suffered as a result of the conduct that is charged here.

With respect to Professor Laby, because we are going to introduce evidence about trading conduct with investment advisors, we do think it is helpful for the jury to know basic things about investment investors, what is an investment advisor, what are the duties an investment advisor owes to his or her clients. That is something we will be able to accomplish in 5 questions. That is not something that we intend to belabor with Professor Laby because we are not alleging Mr. Hirst was an investment advisor.

That is clear from the indictment. We are aware with this issues. We intend to treat them with dispatch, but we do believe under the law we are allowed to prove the acts of the conspiracy as a whole.

THE COURT: Okay. Let me ask about the July 28, 2010 conversation, recorded call between Jason Galanis and Mr. Hirst. First of all, I understand it is a brief conversation. Is there an issue as to the completeness of the conversation? Is it a complete conversation? You have someone who will so testify, or is there a stipulation on that?

MR. BLAIS: Your Honor, we have a witness who will testify that -- so let me quick background fact. On the call, it is approximately a five-minute call.

THE COURT: It is not that quick.

MR. BLAIS: It is not that quick.

THE COURT: I got the impression that it was. I misunderstood the length of the call. I didn't realize it was five minutes.

MR. BLAIS: It is approximately a five-minute call.

The relevant discussion that is cited in the papers is approximately 20 seconds. We are prepared for completeness purposes to offer the entire call. It is only five minutes. We are also prepared to offer the segment of significance, again about 20 seconds or so.

With respect to the completeness of the call, I think that a witness from the FBI will say that the call that is the exhibit is the entire call that is on the FBI's servers. Now, it does, the call does cut off while somebody is talking, it ends. We don't know why. We are trying to figure out if we can determine whether it was a hangup or somebody lost cell reception. We don't know for certain right now, but the FBI can say that that is the entirety of the call that is on the

FBI's backup servers that maintain either conceptually or wiretapped calls. I don't think there is an issue from that standpoint.

We have proposed a stipulation with respect to authenticity of the call. We are still in discussions with defense counsel about that. Either way, we are prepared to either authenticate via the stip or authenticate via FBI witness who can testify it was an exact copy of what is resident on FBI servers.

THE COURT: Is there anything, Ms. Harris, you want to tell me about the call?

MS. HARRIS: Our point, and it is raised by the government in what they just said, the call is cut off. Obviously, it sounds like from the where it is cut off, individuals on the call are still speaking to each other, and given that we disagree with the government that the substance of the call is facially evident or the meaning of the call is facially evident, that whatever happened in the rest of the call would have been further context for what was meant by the speakers.

Now, that's given the sort of relevant section is just a few seconds, 10 seconds, not even, maybe 20 seconds at very most, to take these few words and infer and make a larger, much larger argument, much larger inference I think is what the government is going to do at trial. Given the call is cut off, we thought that presented concerns.

With respect to authenticity and FBI witness, we are not picking that battle. If it is on the server, it is on the server. That is not the issue here. The issue is just the meaning of the call, given what we know about it, which is it is cut off and it is not evident from those few words to us at least, we think there is a fair dispute, and there is case law that suggests if there is a lot of argument or speculation the government has to do to explain the call, maybe it is not an appropriate basis for admission.

There are additional issues about the call I don't know if we can have a fulsome discussion about in open court, but we discussed them in the letter.

THE COURT: I don't know what everybody is going to do with this fulsome discussion in open court because we are going to have a speedy and public trial and --

MS. HARRIS: That is why I am raising it now so we don't have to delay the proceedings. It is about additional evidence we want to elicit for context so the jury can understand and we can properly weigh that evidence.

THE COURT: Right. But, you know, it seems to me, I read the 20-second-portion, the text of it, and I think a jury can absolutely understand it, can absolutely understand it. You can draw your inferences from it and the government can draw, endeavor to have the trier of fact draw the inferences it chooses, but so far I haven't heard any argument of an unfair inference to be drawn from it.

Mr. Hirst states, "It's kind of funny I was reading the registration statement quickly and I was just looking at the number of shares, the whole, the whole Shahini thing. I mean nobody, they, they totally missed it, everybody."

It is not so cryptic that a jury cannot understand the words, and it's fair for the government to seek to have the trier of fact draw certain inferences from it and for you to argue that those inferences are not reasonable ones to draw.

MS. HARRIS: That is fine. As I said, we raised a concern about the cut off call. The only additional point which I think is very important to us is the notion of being able to solicit additional evidence, and we can do it if the government agrees, and court lets it in, by stipulation or however is appropriate and streamlined about the number of calls and the only one that the government is admitting.

THE COURT: Well, talk to the government about that.

MS. HARRIS: They do object to us being able to, which is why we raised it for the court.

THE COURT: Well, let's see. Could you offer those calls in evidence on your case over an objection by the government? I think there might be issues with that.

If, for example, you could offer those calls, then you could sit here and say well, I want to offer all the calls and it is up to the government to decide whether they prefer to stipulate.

MS. HARRIS: We don't want to offer the substance of the calls, just the fact there are X number of additional calls.

THE COURT: No, but the point I am making is the appropriateness of that stipulation, if it is implying, as you do want to imply from it, that it said something about the content of those calls, that's the inference you want to draw the jury to draw, that there were 26 phone calls, but the government only thinks one of them is incriminating, it is an inference about the content.

So, therefore, the question that I ask myself in deciding the appropriateness of a stipulation as to the number of calls is the basic question: Well, on your case would you be able to offer the 26 calls for the purpose of showing there were 26 innocent phone calls?

I don't know that you would. I don't know that they would come into evidence. I don't know under what theory they would come into evidence, and if the calls and their content wouldn't come into evidence, then I don't know why you would be able to because really when we talk about a stipulation, we're talking about in lieu of some other evidence that you would offer, that maybe an easier way to offer it is by stipulation than, if you will, the long method. There is no long method that I yet see that you would be able to offer, and I invite you to educate me otherwise.

MS. HARRIS: We'll do that. As we get closer to trial, we can put that into sharper focus for the court.

THE COURT: I know you want to be assured that the government's fact witnesses do not opine on legal requirements, public disclosures, laws and rules applicable to corporate governance, canon law, et cetera.

It depends on the specific question asked of the jury, and I have no problem with your objecting to questions, and I will rule in context. With regard to Shalian, Shalian, I realize he's the junior guy at this law firm, but that does not mean that there could not be some evidence that the government can elicit from him. If it is probative and it is relevant and it is not hearsay, I'll allow it. If it is not one of those things, I may sustain an objection, depending on what it is.

With regard to Akdeniz, the government says it is not planning on offering opinion testimony from Akdeniz of an impermissible sort. Let me ask the government, are you planning on eliciting opinion evidence from Akdeniz?

MR. BLAIS: Not that I believe, your Honor. We do intend to elicit the factual basis on which she, as the compliance officer, determined that Rock Capital should not accept those particular shares, but I think that is a factual issue, not an opinion issue.

THE COURT: Right, all right.

MS. HARRIS: Just on that point quickly, I think it is a very fine line when you have a compliance officer, internal due diligence person doing an internal, almost internal investigation or review of documents or making inquiries and they come to certain conclusions. Those conclusions, I think, are fairly clear are mixed objective and subjective opinions. They can make an opinion or conclusion, and you see this in one of the exhibits. There is a notation public disclosures don't contain reference. She is making an opinion about public documents in this case, which for the purpose of Rock Capital, is whether or not an account should be opened for these particular shares at issue.

So the question she was looking at is going to be distinct from the question the jury is looking at. If she is giving her opinion about disclosure documents or key documents in this case, that they look suspicious or shady or she had questions about them, there is a real risk of confusion for the jury when they're asked to consider the same documents themselves for a different purpose.

THE COURT: Well, that's why limiting instructions can be valuable, and again it sounds like her testimony is going to be limited to what she saw, what she heard, what she did at the time of the events, not what she thinks or believes as she sits in the witness chair today.

All right. With regard to the January 28th, 2011 New York Stock Exchange letter, as I get it, I think I get it, think this is a letter that was prepared by -- was it Jared Galanis or Jason Galanis, who prepared the letter which he signed?

MR. BLAIS: I don't know that it is totally clear who prepared the letter. There was a statement in a proffer a couple of days after the letter was sent where Jason claims to have authored a letter to the NYSE. There is a reference to a specific letter. Given the timing, it is a reasonable deduction it was that letter.

THE COURT: Let's assume, assume if there was testimony in this case that Jason Galanis prepared it, and it doesn't sound like there is, but let's assume there is a stipulation of the government that Jason Galanis prepared the letter, but if Mr. Hirst knowingly affirmed the statements therein, you're in pretty much the same place in terms of it being admissible against Mr. Hirst.

You can argue, I suppose, that it wasn't his idea originally. I don't know whether that gets you anywhere, but what's the defendant's point on this letter?

MS. HARRIS: Your Honor, we raised it I think in advance because there are real concerns about authorship here and responsibility and the fact that it is unclear, and that there are a number of different individuals weighing in on this letter is very significant in the course of the trial, which I think will become more clear as we get into the middle of it.

What I think is important here, and understanding it is coming in, what the government said in its letter is absolutely true, our concerns go to the weight of the evidence, and with that in mind, I think that's where we would ask that this proffer statement the government just referred to as a statement against penal interest. It is not hearsay. It falls within one of the exceptions because it is very relevant to how the jury should consider that piece of evidence which is going to be attributed by the government to Mr. Hirst because it purportedly bears his signature.

THE COURT: Well, you know, I've been thinking about the statements by Mr. Galanis during proffer sessions and the reliability of and trustworthiness of such statements, and in some cases you have, say, a cooperating witness who makes statements in a proffer session, and subsequently the government provides a 5K1.1 letter at the time of sentencing, gushing about how truthful and honest the cooperator was, but then argues at trial that no, this person can't be believed.

But here I have a different set of facts before me. As I understand it, it is the government's theory of the case that at the time this man was speaking and attending proffer sessions, he was participating in a criminal conspiracy, a conspiracy to which he has now entered a plea of guilty, and why doesn't that cast serious doubt on the trustworthiness of statements made while he was parading as a choir boy and on Team USA?

That is the question.

MS. HARRIS: I recognize that, your Honor. A couple of thoughts. As I understand it, it is a tricky issue. One, I would suggest that whether or not the government has given it the seal of approval at the end of the process shouldn't dictate whether at the time the statements were made, they were against penal interest.

Here beyond that issue is the fact there are corroborating circumstances for that particular narrow statement that we are looking to get in. We are not looking wholesale to bring in everything. We are looking for this very narrow statement.

THE COURT: What are the corroborative circumstances?

MS. HARRIS: There is Rule 16 discovery, and we provided the government, identified for the government an example of this, in draft versions of the letter there are inserts that say in brackets, square brackets, JG to insert here, you know, or JG to add. There are bubble comments that appear to be from Galanis, giving heavy input on the letter.

It doesn't mean he single-handedly sat there with a legal pad and handwrote everything from beginning to end. It is not saying he wrote the whole thing but was taking a substantial role in it, independently corroborated by I think those notations in the discovery that was provided by the government.

It would be one thing if we said we want reams of proffer statements to come in or, no, we are looking for one particular statement about a particular document that is central to the government's case we have a real dispute who the author is, who is responsible, how it came to be the way it was.

THE COURT: Can you get those letters into evidence?

MS. HARRIS: Your Honor, I believe we can.

There are other draft documents, the government is seeking other drafts, registration statements the government is seeking to introduce, and I think these appropriately go to the weight of the evidence of the final letter that they seek to put in.

THE COURT: Is the government going to object to the admission of the drafts?

MR. BLAIS: One moment, your Honor.

(Off-the-record discussion)

MR. BLAIS: I think we have to look back at the specific document. I don't have the specific document they're referring to. We need to look to see whether there is a hearsay exception to that particular document. I am not prepared to say here whether we agree to admission of that document or not. I think in general there are two responses:

One is with respect to the trustworthiness of the statement itself, right, and the statement to put it in context was I authored a letter to the NYSE. I think what the evidence they're suggesting was there were placeholders for him to put certain things in is not corroborative of the fact he authored the entire letter, which is what I think a stand alone stipulation of saying Galanis said at some point that he wrote the letter, I think that is suggesting he wrote the entire letter. The evidence that they're pointing to at least as described is suggesting he filled in certain portions of the letter.

I don't know that those are entirely -- I think the stipulation they would be seeking is entirely consistent with the corroborative evidence.

THE COURT: That may be an issue of wordsmithing that can be worked out, correct?

MS. HARRIS: I think so.

THE COURT: I think that is something can be done.

MR. BLAIS: The larger issue and the second point, the case law says it is not just the corroborative circumstances of the statement's trustworthiness, but corroborative circumstances of the declarant's trustworthiness.

I think for the reasons your Honor articulated a few moments ago, that doesn't exist here. I think we say in our response it is difficult to conceive of a declarant who is less trustworthy than Jason Galanis given all the circumstances.

THE COURT: Let's see if we can work out a stipulation because it seems that if the stipulation is in accord with the truth, that's a great virtue and it may be, it may be that from the drafts it is in accordance with the truth that Jason Galanis had a role in the drafting of the letter.

At the end of the day, and I don't say this for any other reason other than facts are stubborn things, not that I have any point of view on it, but if Mr. Hirst signed the letter and affirmed its content, if it is not a forgery, if he didn't have a gun pointed to the back of his head when he signed it, it is his statement even if Jason Galanis was the guy who said this is the wording, this is how it should be said, this is something we should be doing.

And even if Hirst said, "I don't agree," but at the end of the day he went along with it and signed it, that's a problem.

MR. BLAIS: We read you loud and clear. We'll speak to defense counsel about this. I am sure, I am confident there is a high likelihood we can work something out on this.

With respect to the second statement, though, I do think we feel differently as to whether there is --

THE COURT: What is the second statement?

MR. BLAIS: The first statement is with respect to this NYSE letter. The second statement was with respect to withholding information from Mr. Hirst about an individual with criminal associations being involved in an investment opportunity unrelated to and prior to the Gerova investment.

THE COURT: That is the statement that was a Brady disclosure, and I've ruled on the Brady aspect of it. Again I haven't heard that the defendants are seeking to offer that.

Are you seeking to offer that?

MS. HARRIS: Your Honor, we are for a very narrow purpose. First of all, we believe it is also a statement against penal interest, for the same reasons we pointed to with respect to the other statement. Beyond that, it is not being offered for the truth of the matter. It is being offered because it relates to whether or not there is a meeting of the minds.

As you recall, the statement says that information was withheld because Mr. Galanis said if the information was given to Mr. Hirst, he would not engage in the investment, he would not, he would not agree to the investment if he knew the truth of the statement there.

Previously -- and I am newer to this case than others, and there has been a lot of paper and ink devoted to this subject -- it was unclear what connection that other investment opportunity and the references in that statement had to the instant case, and in our in limine motion we did proffer for your Honor in the portions that were under seal the connection that we believe that there is actually a factual connection between the references in that statement and this case, and so first we believe there are actual connections between the matters talked about in that statement and this case. That is number one.

Number two, regardless, here the central question is whether there was a meeting of the minds for a criminal investment scheme, a criminal securities fraud between Mr. Hirst and Mr. Galanis. The fact that Mr. Galanis said that he is in another investment opportunity is withheld information, the fact of that, but the reason why he withheld that information and his belief about Mr. Hirst's willingness or unwillingness to engage in investment scheme with criminal associations I think is very relevant to this case.

MR. BLAIS: We outline this on Page 12 of our response, a number of issues with this statement. There is obviously a hearsay issue we just discussed about Mr. Galanis' trustworthiness in the context of a statement against penal interest, so that is one.

Number two, they have proffered a non-hearsay reason why they would seek admission of this particular statement as to evidence whether there was a meeting of the minds. It is only relevant whether there was a meeting of the minds if the statement is, in fact, true. If the statement isn't true, it has no relevance at all whether there was a meeting of the minds. It is, in essence, a truth-based purpose, and we think ultimately not relevant for the purpose of this trial whether in some past investment opportunity Mr. Galanis withheld information from Mr. Hirst.

THE COURT: Let me break this down just a little bit.

You're saying the fact that it was said is not relevant, either. Maybe for the truth you might have an argument it would be relevant, but you have a hearsay problem with it. The fact it was said has no probative value.

MR. BLAIS: Right.

THE COURT: Let me question Ms. Harris on it. The fact that it was said, is there any probative value to that?

MS. HARRIS: If I could have a moment, your Honor?

THE COURT: Sure.

(Off-the-record discussion)

MS. HARRIS: This is an intellectual struggle.

It is not an easy area of the law. We think it relates to state of mind, right, that the fact that, the fact of what was said reflects the state of mind of the alleged co-conspirator here, and so especially because of the facts we proffered with respect to the additional evidence linking the issues discussed in his statement with the issues in this case, and those are facts Mr. Hirst was not aware of, is not alleged to be aware of, I think it connects the statement that he made in the proffer much more closely to the statements, to the issue and transaction in this case.

THE COURT: All right. It appears to me that at this stage of the game, the statement does not come in for the truth of its content as a statement against penal interest because under Bahadar, 954 F.2d, there is a required corroboration of both the declarant's trustworthiness as well as the statement's trustworthiness, and for the reasons that I outlined before, I conclude that that cannot be met.

Whether it comes in not for the truth of its content, but for the fact that it was said I will reserve on. The defendant may not refer to the statement in opening statements, but I will wait and see what additional argument is presented to me.

MS. HARRIS: Thank you very much, your Honor.

THE COURT: Are there any other of your issues that you seek a ruling on at this stage?

MS. HARRIS: I believe that is good, your Honor. We got through the list. Thank you very much.

THE COURT: All right. The same question for the government.

MR. BLAIS: We just had a few issues to discuss, your Honor, some of which are reflected in the papers and others which are more --

THE COURT: Go ahead.

MR. BLAIS: The first question, can your Honor summarize the timing of your trial days and whether the court intends to sit on Friday during this trial.

MS. HARRIS: Yes. Your Honor, just on the scheduling matter, because I am newer to the case, I did have court appearances on Friday, the 16th, which are difficult ones to reschedule. I will, of course -- if the court prefers to sit on Friday, I will, of course, make myself available.

THE COURT: Let's see. First of all, let me inquire of Mr. Blais, what is the expected length of the trial from the government's standpoint?

MR. BLAIS: We intend to call approximately 15 witnesses. We think the trial will take two weeks, at least that the government's case will take two weeks or less. I can't, obviously, speak for how long the defense case might last.

THE COURT: How long is the defense case expected to be, do you know?

(Off-the-record discussion)

MS. HARRIS: Your Honor, at most a couple of days. It could be a lot less, as the court knows.

THE COURT: All right. I will simply say at this stage of the game that we will not sit on Friday, the 16th. Whether we will sit on any other Friday, I don't know at this stage of the game. I'll see what the pace of the trial is. We won't sit that Friday.

MS. HARRIS: Thank you very much.

THE COURT: In terms of holidays, I think at least through September 30th there are not any religious holidays we need to be concerned with. I think Rosh Hashanah comes up on the 3rd and the 4th. Let's see how this all goes, all right?

MR. BLAIS: The timing of the trial day?

THE COURT: The trial day is going to go from 10:00 am to 5:00 pm, with a mid-morning break of approximately 10 to 15 minutes and a mid-afternoon break of similar length, and we'll break for lunch typically between 1:00 and 2:00. There may be reasons because of other court needs where I may reserve the right to vary any of those times.

You will find that one of my peculiarities is that I try to use the full day. So if it gets to be 5 to 5:00, it has been known to happen that a lawyer will say well, this will be a good time for our break for the evening, and I am known to say call your next witness because that is five minutes that we can use. So that's what you are going to find.

I expect the witnesses to be available in rapid fire, and if we are returning from a break and we have a witness continuing his or her testimony, the witness is in the witness box. It is not that we get together, I convene the session and then the government sends someone out to get the witness from some kind of a witness room while we all sit here twiddling our thumbs. The witness is in the witness box. Premarking exhibits is required.

Mr. Blais, have you tried a case before me?

MR. BLAIS: Not before you. I came very close, your Honor, on a multi-defendant case.

THE COURT: Anyone else on the trial team? Ms. Hector?

MS. HECTOR: I second-sat on a case, a drug case.

THE COURT: I remember that case. That is right.

Would you mind if I mentioned that I recall that was the case where you objected to a question by the government?

MS. HECTOR: Sometimes that happens when second-seating, that does happen sometimes.

THE COURT: It was a moment of some levity. When defense counsel said, "Your Honor, I am not sure the government can do that, I said I think you're right."

MR. BLAIS: Sorry. I have one more logistical question and two substantive ones.

On the logistical issue, we have some exhibits, largely e-mails, primarily e-mails obtained via search warrant which are likely to come in via stip, largely e-mails between co-conspirators who are not going to be witnesses at this trial. I think it is our intention, assuming it is amenable to the court, to call an agent or a paralegal or somebody in that circumstance to essentially sit in the witness chair and read certain portions of the e-mails. We obviously don't intend to belabor that because we understand that can get boring, but we think it is necessary to highlight portions of exhibits that otherwise wouldn't be coming in through a percipient witness.

THE COURT: Offhand, it sounds to me like that may be permissible, but I will tell you that this is right in the core function and role of a trial judge to limit, and if my sense of it is it is slowing down the pace of the trial, it will come to an abrupt end, and the jurors will be left to read it during deliberations.

MR. BLAIS: Fair enough.

THE COURT: As a precaution.

MR. BLAIS: Fair enough. We wanted to give your Honor advance notice.

With respect to the substantive issues, we did in our response to the motions in limine request that your Honor direct defense counsel to produce their, or at least identify their exhibits in advance of the trial.

THE COURT: I was looking at that request there and I was looking for the case law that supported that. I understand, you know, you are citing the equities of the situation from the standpoint of what you've agreed to with defense counsel, but I don't know that I know the legal foundation for the request and it wasn't obvious to me on its face.

MR. BLAIS: One legal foundation is Rule 16, which requires the defense to produce to us any materials that they intend to use at trial. Now, obviously to the extent they intend to use materials that we've produced as exhibits on their own, certainly that is not Rule 16 material. We already have it and they already have it. To the extent there are new materials that they intend to --

THE COURT: Well, that one is easy.

Ms. Harris, has the defendant produced all documents or other physical materials for inspection, copying or photographing that it intends to offer in its case in chief?

MS. HARRIS: Your Honor, as Mr. Blais just pointed out, to the extent we're offering in our case in chief documents produced to us by the government, that is not permitted by Rule 16.

In the vast majority, if we were to imagine what we are going to do now, the vast majority if not exclusive everything we intend or thinking about or might introduce is in the government's discovery.

THE COURT: No, no. I want to know about the difference between, "vast majority if not exclusively." That is what I want to know about. How has that all been produced?

MS. HARRIS: At this point in time, we don't have a specific document -- I want to make sure.

(Off-the-record discussion)

MS. HARRIS: We can't think of one sitting here today we have gotten from some different source that we intend to introduce at trial that has been produced to the government.

THE COURT: Let me put it this way --

MS. HARRIS: We issued a number of trial subpoenas and, in fact, on the way here I mentioned, I said we may need to write to Judge Castel tomorrow and ask to convert some of them to Rule 17 forthwith. So ordered subpoenas are for everyone's benefit, not just the defense. If we get additional documents and we are not getting them on the date of trial, which is when the trial subpoena is returnable for --

THE COURT: I would suggest you do that today or Tuesday.

MS. HARRIS: Okay. I will do that, your Honor.

We are continuing our investigation, just like the government is continuing theirs, with respect to additional witnesses and 3500 material, and to the extent we receive, obtain a document we know we are going to introduce at trial, we'll produce it. We want to be reasonable and cooperative and say we are working on it. There is not going to be some ambush here. There is not something new we have been sitting on. That is not the situation here. .

THE COURT: No, but I can be helpful in this regard.

Any document in the possession or control of the defendant which the defendant seeks to offer in its case in chief shall be produced to the government no later than September 5th, at noon, or the defendant will be precluded from offering it at trial.

MS. HARRIS: If we have it, your Honor.

THE COURT: You heard the words. You heard the words. I chose them carefully.

MS. HARRIS: Thank you.

THE COURT: "Defendant's possession or control," that those were the words.

MR. TREMONTE: Your Honor, everyone has been choosing their words carefully, and I don't want Ms. Harris to be saddled with my lapse of memory. When we get back to the office, we will double-check and I will confirm that Ms. Harris' representation we can't think of any that we have is, in fact, the truth. If it turns out there is something, we will produce it promptly.

THE COURT: Well, let me restate what I said. That date is noon on September 5th.

MS. HARRIS: Understood.

MR. TREMONTE: Understood.

MR. BLAIS: I have one last substantive issue, and that is the issue of experts. This again is more of an advanced notice point than anything else. The government out of an abundance of caution noticed two witnesses that I think in our notice said we don't believe they're expert witnesses, but in an abundance of caution, because they're not percipient witnesses, we are noticing them.

Different judges have different practices. We have since indicated to defense counsel that we do not believe that they're expert witnesses because they're not offering any opinion testimony. That is based on their expertise. They're simply people with expertise who are going to be giving factual background information.

Defense counsel has made disclosure to us of four potential expert witnesses. We have asked whether those experts fall into the same category as ours, the witnesses we noticed, i.e., people with expertise or offering factual information or whether they're, in fact, offering opinion testimony, in which case we believe the disclosure they made to us, because it does not disclose a summary of those opinions or the bases for the opinions, we believe the disclosure is inadequate.

We are still in discussions about this topic. To the extent they inform us the noticed individuals are offering expert testimony, and we believe it is precludable for whatever reason, we may file a motion next week when we resolve this issue regarding that expert testimony. We wanted to give the court advance notice that issue is still under discussion and there may be motion practice on it next week.

THE COURT: Anything further?

MR. BLAIS: Nothing.

THE COURT: Is there anything further from the defendant?

MS. HARRIS: Nothing further, Judge. We did have one question about jury selection, if your Honor could briefly summarize the court's practices in that respect.

THE COURT: What is going to happen is I use an aid to memory. An aid to memory is not a questionnaire, but it is a listing of certain topics of which there will be questioning which is handed out to the jurors so that all of the jurors may follow along. The government will have six challenges, correct?

MR. BLAIS: Yes.

THE COURT: And the defendant will have 10 for the regular 12 jurors. I haven't decided how many alternates I will impanel, so I don't know how many challenges you'll have as to the alternates yet, but I will endeavor to qualify, and "qualify" means have a number of jurors for whom there is not a challenge for cause, which equals the number of regular jurors plus the number of alternates, plus the number of peremptories for regulars and alternates. That is the number of jurors I need to qualify.

Along the way, and in jury selection there may be instances where a juror is challenged for cause and the challenge is granted. When that happens, nothing, nothing remarkable occurs because I am mindful of the number that I need to qualify. You'll be mindful of the number I am endeavoring to qualify, and I may expand out the number of jurors who I am questioning in the numerical order in which they come into this courtroom in sequential order. They're placed by the Clerk in the numerical sequence indicated by the jury assembly rooms card which they receive.

At the end when all the challenges for cause have been ruled on and we know exactly who our qualified group is, we will go through the numbers at the request of any party to make sure that we are all on exactly the same page, that there is no mishap or misunderstanding of the numbers of the jurors who are in and those who are out, and then there will be the peremptory challenges at the sidebar of the regular jurors, going in alternating rounds, with the government going first, then the defendant and so on.

Any challenge not exercised in a round is waived. Then we will know who our regular jurors are. Then we will engage in a similar process as to the alternates. That is how I would describe it.

MS. HARRIS: Just to clarify with the peremptories, I am asking the questions of the alternating jurors, peremptory challenge, is it one, followed by one, followed by one, with the remainder of the defendants at the end?

THE COURT: Yes, with the defense at the end, with the defense at the end. That is exactly right.

I am reminded to ask the government to get me a list of persons, places that are likely to be mentioned in the trial, and I will need that by 10:00 am on September 8th. If the defendant has any who the defendant wishes me to add, get it to me by the end of that day.

What else? I think that's it. Any other questions?

Thank you very much.

(Court adjourned)